No. 80-1006

IN THE

Supreme Court of the United States

October Term, 1980

JAMES CRAIG, JR., EDWARD BORJA, HENRY COOKS, LEE DOUCETTE, GILBERT HERNANDEZ, NATHAN HOLMES, CLYDE JOHNSON, THOMAS LARK, HENRY REED, MICHAEL RUIZ, VICTOR SALAZAR, SHIRLEY SAMPSON, and WILBUR WEBB, individually and on behalf of all others similarly situated; LOS ANGELES COUNTY BLACK EMPLOYEES ASSOCIATION, a non-profit California corporation; LOS ANGELES COUNTY CHICANO EMPLOYEES ASSOCIATION, a non-profit California corporation; WOMEN IN COUNTY GOVERNMENT, an unincorporated association,

Petitioners.

vs.

COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Petitioners,

vs.

COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondents, County of Los Angeles, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 626 F.2d 659 (1980).

Statement of the Case.

The petitioners' sparse recitation of the facts of the case are amplified as follows to set the issues in their complete factual context.

On behalf of a class of Mexican-Americans, the petitioners brought this action under 43 USC § 1981 and Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, *et seq.*). Title VII governed employment practices implemented after March, 1972 while § 1981 pertained to those occurring earlier. The actionable period under the latter statute commenced March 12, 1970, three years prior to the filing of the complaint.

The testing validation issues revolve around three forms of a written pre-employment test administered by the County of Los Angeles within the actionable period. The first was a test utilized by the County for some years prior to March, 1972, the effective date of Title VII as to governmental entities, and used until December of 1973. The second test, designated ET4-1, was administered from December of 1973 through November of 1975. This test replaced the earlier test and was a revision made as a consequence of the job relatedness requirements of Title VII. The third test was a commercially purchased examination (CPX-51X) that was administered for one time only in January, 1976. Only the first two tests involve issues presented in the petition for writ of certiorari.

All forms of the test were used on a pass/fail basis with only passing individuals eligible to advance to subsequent phases of the examination process.[1] The written examination

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[1]The written qualification test was the initial but not the only hiring criteria. There was no adverse impact in the administration of the other portions of the employment process (oral interview, physical examination, physical agility test, and background check) and these were not challenged in the lawsuit.

was unweighted and all the passing applicants were unranked when they proceeded to the oral interview phase. The results of the oral interview established the applicant's ultimate rank on the eligibility list. During the period 1972 through 1975, 69.6% of all applicants taking the test passed. 55.1% of the Mexican-Americans taking the test passed during the same period. (R. 21).[2]

After the effective date of Title VII, the County undertook a study of its test administration with the object of revising their test to reduce adverse impact, and to validate it in accordance with Title VII standards. For an eight-month period, from March of 1972 to December of 1972, the County continued to administer its traditional test without change. There was an adverse impact on Mexican-Americans during that period.

Requiring more time to revise and validate their tests, the County continued to use the old test throughout 1973 but in such a way that there was no adverse impact on any minorities. During 1973 until the new test form went into effect in December, 85% of all Mexican-Americans taking the test passed and advanced to other portions of the examination process.

In December of 1973, the County introduced a new revised form of the test and utilized it until November of 1975. The revised test differed from the earlier version in several respects. Certain sections, primarily the arithmetical computation portion, were eliminated and a clerical perception section added. (R.T. p. 96, line 24). The revisions resulted in a higher Mexican-American passing percentage

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[2]Throughout this opposition, references to the Record on Appeal will be designated by "R.", references to the Reporter's Transcript by "R.T." and to the Appendices in the Petition by "App."

(58.5%) than heretofore had been the case by almost 10 percentage points.

The County's validation study and trial evidence was directed toward the new revised form of the ET4-1, first utilized in December, 1973, — the County taking the position that the temporary interim use of the old test during the transition period immediately following the effective date of Title VII did not violate that statute. With regard to the revised test, the respondents, through the testimony of an industrial psychologist, established the job relatedness of the test by a Concurrent Criterion Related Validation Study which demonstrated to a very high degree of statistical accuracy that the ET4-1 pre-employment test was highly correlated with, and predictive of academic performance in the post-employment training academy.[3]

The respondents' validation study demonstrated that there was a very high correlation between the applicant's score on the pre-employment aptitude test and his score (academic grade point average) in the academic curriculum of the training academy. The correlation coefficient was .60 and statistically significant at the highest level of confidence (.01). The validation study conducted by the County was done by Dennis Hokama, Personnel Analyst, under the supervision of two Ph.D's in Industrial Psychology, Dr. Coleman and Dr. Ford (R.T. p. 250). Dr. Coleman, familiar with the American Psychological Association standards and the federal guidelines testified that the study which he supervised

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[3]The academic portion of academy training included courses in constitutional law, the law of arrest, search and seizure, criminal law and the rules of evidence, among others. The complete academic curriculum was included as part of the validation study.

and reviewed throughout was properly conducted and was a sound study. (R.T. p. 380).

During the trial, the petitioners conceded that it was appropriate to correlate a qualification test with subsequent training academy performance (R.T. p. 406, lines 8-17), but raised certain objections to the methods of the study. The petitioners' principal claims of methodological defect, subsequently rejected by the Ninth Circuit, and raised in the petition herein were:

1. The study sample was legally defective because the County did not hire individuals who failed the test in order to validate it. They claimed that the only legal method of validation required a pure predictive criterion study and a concurrent criterion study was insufficient.
2. Despite a correlation coefficient of .60, the test had no practical significance.
3. The County made no analysis of the cut-off score.

The petitioners did not claim in the trial court or on appeal that the alleged defects went to the weight to be accorded the respondents' validation study and the trial court's finding was clearly erroneous. Instead, the petitioners urged as they do in the petition herein that the alleged defects rendered the validation study inadequate as a matter of law.

REASONS FOR DENYING THE PETITION.

The reasons this Court should refuse to grant the Petition for Writ of Certiorari are as follows:

1. The Court of Appeals correctly held that purposeful discrimination must be proved under § 1981:

a. The ruling is consistent with well-established principles of statutory construction; Equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981.

b. All Circuits which have addressed the § 1981 issue are now in accord in holding that intent is a requirement for cause of action under that statute.

2. The Respondents did not violate Title VII by their use of a written test having adverse impact for a temporary interim period of 8 months immediately following the effective date of Title VII.

3. Trial and Appellate Court rulings on the methods of test validation were not clearly erroneous; The holdings are consistent with other decisions and the EEOC Guidelines, turn on the particular facts of the case, and do not raise issues of a significant nature that would justify review by this Court.

ARGUMENT.

I.

The Circuit Court's Holding That Discriminatory Intent Is Required Under 42 USC § 1981 Is Correct and in Conformity With the Holdings in All Other Circuits.

1. The situation has changed substantially since this Court granted a hearing on this issue in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

The posture of the parties in the context in which the issue is raised is entirely different. In the case at bar, the respondents prevailed, the Ninth Circuit agreeing with their position that intent is a necessary requirement for a cause of action under § 1981. The situation was the reverse at the time the Court granted certiorari in *County of Los Angeles v. Davis*. The Ninth Circuit in the *Davis* case held contrary to the weight of existing authority that intent was not a necessary requirement under § 1981 and that Title VII standards were equally applicable to causes of action brought under the Civil Rights Acts of 1866 and 1870.

The Courts of Appeal of all of the circuits except the Fourth, which has yet to consider the issue, have now held that purposeful discriminatory intent is required to prove a cause of action under Sec. 1981. Numerous district courts have reached the same conclusion.[4]

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[4] *1st Circuit - Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 15-16 (1979).

2nd Circuit - Guardians Assn. v. Civil Service Commission, ... F.2d .... (1980), 23 FEP Cases 677, 700.

3rd Circuit - Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3rd Cir. 1977) implying that burdens of proof under § 1981 are the same as under the Constitution, cert. den. 98 S.Ct. 1451 (1978).

(footnote continued on following page)

The Ninth Circuit's ruling on intent was correct. Uniformly, since this Court's decision in *County of Los Angeles v. Davis*, the courts below have all held that intent is required. The most recent appellate court to consider this question was the Second Circuit in *Guardians Association v. Civil Service Commission*, ... F.2d ...., 23 FEP Cases 677 (1980). The Second Circuit in finding that discrimi-

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5th Circuit - Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978); *Grisby v. North Mississippi Medical Center*, 586 F.2d 457, 614 F.2d 1300, 1309 (1980).

6th Circuit - Arnold v. Ballard, 12 EPD para. 11,224 (1976). See subsequent district court opinion holding that under *Washington v. Davis* purposeful intent is required for § 1981 and expressly declining to follow the 9th Circuit's now vacated decision in *Van Davis v. County of Los Angeles. Arnold v. Ballard*, 448 F.Supp. 1025 (1978); *Detroit Police Officers Assn v. Young*, 608 F.2d 671, 692 (1979).

7th Circuit - Mescall v. Burrus, 603 F.2d 1266; *United States v. City of Chicago*, 549 F.2d 415 (1977); *City of Milwaukee v. Saxbe*, 546 F.2d 693, 705 (1976) (burden of § 1981 cases is the same as the Constitutional burden under the Fifth Amendment).

8th Circuit - Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (Sec. 1981 involves different standards of proof than Title VII); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978). Sec. 1981 claim follows constitutional rather than Title VII evidentiary standards.

9th Circuit - Craig, et al. v. County of Los Angeles, et al., 626 F.2d 659 (1980).

10th Circuit - Chicago Police Officers Association v. Stover, 552 F.2d 918 (10th Cir. 1977).

District Courts - Harris v. White, 479 F.Supp 996, 1002 (1979) (citing the First Circuit in *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 15 (1979).

District Courts - Arnold v. Ballard, 448 F.Supp. 1025 (1978); *Rich v. Martin Marietta Corp.*, 467 F.Supp. 587, 617 (1979); *Lewis v. Bethlehem Steel Corp.*, 440 F.Supp. 949, 963 (1977); *United States v. State of So. Carolina*, ... F.Supp. ...., 15 FEP Cases 1196 (1977) (3-judge panel that included two circuit judges); *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (1977); *Dickerson v. U.S. Steel Corp.*, ... F.Supp. ...., 15 FEP Cases 753 (1977); *Velzaga v. National Board of Respiratory Therapy*, 13 FEP para. 11,525, 8875, 8881 (N.D. Ill., January 27, 1977).

natory intent must be proven in actions brought under § 1981, made an exhaustive analysis of the issue and the earlier decisions. Emphasizing that the court's inquiry must focus upon the congressional intent at the time Congress enacted § 1981, the Second Circuit, after such analysis concluded, "the language structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination in a wide variety of circumstances, including but not limited to employment discrimination. While § 1981 and Title VII overlapped to a certain degree, the two statutes differ in many ways including the fact that Title VII is concerned exclusively with employment discrimination whereas § 1981 is addressed to a wide variety of rights. Moreover, Title VII establishes an elaborate administrative enforcement mechanism that conditions the right to judicial relief on the exhaustion thereof. Section 1981 on the other hand does not have its own limitation." *Supra* at 703.

The decision in the case at bar brought the Ninth Circuit in accord with all other circuits that have ruled on this issue. Section 1981 was enacted as an equal protection statute designed to enforce the constitutional rights and whose standards of liability track constitutional principles, not those of Title VII. The 39th Congress at the time of the enactment of § 1981 could not have intended that Title VII adverse impact and test validation standards, creations of twentieth century testing methodology and the Civil Rights Act of 1964, could have pertained to actions brought under the Reconstruction Era civil rights acts.

The Ninth Circuit in holding that intent is required has harmonized the proof requirements for causes of action under the Federal Civil Rights Acts of 1866, 1870, 1871 and the U.S. Constitution. Recognizing an intent requirement for actions brought under § 1981 is compatible with this Court's holding in *Washington v. Davis* and the Courts'

recognition of different liability standards for employment practices occurring before and after the effective date of Title VII. To transpose the adverse impact standards originally articulated by this Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971), a Title VII case, to § 1981 actions would obliterate any distinction between those two statutes and in effect would impose liability on employers for hiring practices without any discriminatory intent that occurred prior to the effective date of Title VII. Perhaps most significantly, the transposition of Title VII standards to § 1981 actions would frustrate the comprehensive congressional scheme embodied in Title VII which includes jurisdictional filing prequisites, statutes of limitations, and mandatory requirements for reconciliation and administrative review.

In its brief in *County of Los Angeles v. Davis*, this respondent noted the substantial threat to Title VII's comprehensive statutory scheme if Title VII standards were made applicable to § 1981. This Court appeared to recognize that danger in a case decided very soon after the Court's decision in *County of Los Angeles v. Davis*. In *Great American Federal Savings and Loan Assn. v. Novotny*, ... U.S. ...., 99 S.Ct. 234, 60 L.Ed.2d 959 (1979) this Court rejected the contention that Title VII rights could be asserted through 42 USC § 1985, noting that if such were permitted "a complainant could avoid most if not all of these detailed and specific provisions of the law . . . the short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays a crucial role in the scheme established by Congress in Title VII", *supra* at 966.

II.

Respondents Did Not Violate Title VII by Temporary 8-Month Interim Use of Test.

The Ninth Circuit was correct not finding that an eight-month interim use of an unvalidated test did not violate Title VII.

From the outset it should be noted that there was no broad generalized holding by the Ninth Circuit that a test having an adverse impact did not have to be validated. The petitioners, with lack of precision in referring to a pre-December 1973 test, neglected to state that the test (the use of which both pre- and post-dated the effective date of Title VII) had adverse effect only during a short eight-month period immediately after March, 1972 and that for the entirety of 1973 until replaced in December it was not used with any adverse impact. (R. p. 21)

After Title VII became applicable to public agencies on March 24, 1972, the County of Los Angeles undertook a reexamination of their current written qualification test for deputy sheriff, the study of which was finally completed December of 1973. The only period of time after the effective date of Title VII that the County's test was utilized with adverse impact was a brief interim eight-month period from March 24, 1972 to December of 1972. (R. 21) Under the then existing EEOC guidelines (29 C.F.R. 1607.9) an employer could utilize an existing test, pending a validation study or consideration of alternatives. This short period of use did not constitute a pattern or practice of discrimination under Title VII.[5] *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977).

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[5]It is also noteworthy that *Griggs v. Duke Power Company* was not decided until March 8, 1971.

The courts below did not render any ruling that changed or affected the validation requirements under Title VII or application of the principles announced in *Griggs v. Duke Power Company*. In refusing to find that Title VII had been violated in this brief period, the courts concluded that the respondents could rely on an interim use of testing devices as indicated in the guidelines, immediately after the effective date of Title VII, while attempting to revise their testing procedures, a task obviously requiring time and study.

In view of the factual context in which the old pre-December test was briefly administered, it is submitted there is no justification for this Court to grant review on a minor issue in the case and on a matter involving no significant factual or legal issues.

III.

The Petitioners' Objections Were Properly Rejected as There Is No One Legal Method of Employment Test Validation; the Validation Study Was Done in Accordance With Professionally Accepted Methods and the Record Does Not Raise the Question Presented.

The Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, stated that "It appears beyond doubt by now there is no single method of appropriately validating employment tests for their relationship to job performance." *Supra*, at 2051, N. 13. In *Washington*, this Court upheld a written test used by the District of Columbia Police Department that was validated in precisely the same manner as by the County herein. In fact, the correlation coefficient is much higher in respondents' study (.60) than in the *Washington* study (.39). *Davis v. Washington*, 512 F.2d 956, 962, N. 38.

Using language that goes directly to the correctness of the Ninth Circuit's ruling in this case, the Court stated:

> "Based on the evidence before him, the district judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and the training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by the regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who are parties to the suit. *Nor is the conclusion foreclosed by either Griggs or Albemarle Paper v. Moody, 42 U.S. 405 (1975); and it seems to us a much more sensible construction of the job relatedness requirement.*" (Emphasis added.) 96 S.Ct. 2052-53.

The Ninth Circuit carefully considered all of petitioners' claimed methodological defects and properly rejected the assertion that a validation study following precisely the approved procedure in *Washington v. Davis* was legally defective.[6] The petitioners' contentions on the testing methodology are contrary to federal testing guidelines, applicable case law, and accepted validation techniques. The petitioners cite no case to support their contentions, which upon brief reflection cannot withstand simple common sense analysis. For example, to require as a precondition for legal

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[6]The Ninth Circuit summarized their conclusion as follows:

"The Sheriff's department demonstrated a very high correlation between scores on the ET4-1 test and academic averages at the Academy. Plaintiffs point to no data which are inconsistent with defendants' validation study. Nor do they cite serious flaws in the study's data-gathering or handling which might warrant the suspicion that the obtained correlation is spurious or erroneous." 626 F.2d 665.

validation study that an employer hire individuals who fail their pre-employment test would place an impossible burden on employers, restrict, contrary to the federal testing guidelines, criterion studies to the pure predictive type, and in the context of the examination herein in which 70% passed, would not yield any contrary statistical result.

The petitioners claim that the validation sample was legally defective because it did not include individuals that had failed the test is contrary to the federal testing guidelines. The validation technique utilized by the respondents' experts was a Concurrent Criterion Related Study,[7] that is expressly sanctioned by the guidelines,[8] approved in *Washington v. Davis,* and utilized in almost all modern validation studies for employers.[9]

The fact that almost 70% (69.6%) of all test takers passed and a very high correlation existed between success on the pre-employment test and subsequent academic performance in the training academy, renders petitioners' contentions even more ill taken.

The Ninth Circuit correctly noted:

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[7]A concurrent predictive validity study examines the correlation between pre-employment test performance and subsequent job performance by those employees who took the test and were actually hired. A pure predictive validity study measures the test against all test takers including those that fail to meet the minimum test performance criteria but must necessarily be hired. The petitioners' witness, Kirkpatrick, described a pure predictive study as one where "the test results are not used as a part of the hiring decision. They are simply filed away for research purposes" (R.T. 432, lines 11-20).

[8]Sec. 12(b) of the FEA Guidelines expressly states that "these guidelines do not require a user *to hire* or promote persons for the purpose of making it possible to conduct a criterion related study." (Emphasis added. 28 C.F.R. Sec. 50.14, p. 349.

[9]The method was most recently approved in *Friend v. Leidinger,* 580 F.2d 61 (1978). See District Court findings in *Friend v. Leidinger*, 446 F.Supp. 361, 369 (1977).

> "Under the circumstances here, however, the demonstrated correlation is sufficiently strong to support the inference drawn by the district court after trial that persons excluded from the academy, and thus from the sample, because they failed the ET4-1 entrance exam would not have succeeded in the academic training program. We perceive no reason at this point to require the sheriff's department to hire and train a sample of failing applicants, with the attendant expense to the County and potential unfairness to the candidates so hired, in order to provide statisticians with more certain results." *Craig, et al. v. County of Los Angeles, et al., supra,* at 665 (App. B, p. 12).

The petitioners are not equally wrong in their contention regarding controls for test taking ability. Not only are these unfeasible, they are not required by any guidelines or court decision, and as testified to by the respondents' expert, Dr. Coleman, this was not a significant factor impacting on the validity of the study. (R.T. pp. 379-80). As was the case in *Washington v. Davis,* the respondent's pre-employment test was an aptitude test designed to measure the ability to successfully complete the academic portion of the training program. The academic tests were knowledge tests measuring the recruits' understanding of the subjects taught.

The petitioners misstate the facts in claiming that respondents did not make an analysis of the appropriateness of the pass/fail score. It was testified that the County made such a study and chose a very low cut-off score (only 30% of all applicants failed) to maximize minority passing rates consistent with maintaining test effectiveness. (R.T. 96-97.) The Ninth Circuit's finding on this point is entirely correct.

> "The EEOC guidelines do not require separate validation of passing scores. They do require that the cut-off be 'reasonable and consistent with normal expectations of proficiency within the work force or group

> on which the study was conducted.' 29 C.F.R. § 1607.6 (1975). The sheriff's department complied with this requirement. The evidence indicated that those candidates who barely passed the ET4-1 examination performed correspondingly in the academic classes at the academy. A lower passing score would have resulted in the admission of a number of applicants who would not have been able to perform acceptably in the academy.
>
> "Plaintiffs have presented no evidence indicating that the cut-off score was set arbitrarily. Nor was it so high as to maximize adverse impact on Mexican-Americans." *Craig, et al. v. County of Los Angeles, et al., supra,* at 665 (App. B, p. 12).

The Ninth Circuit holdings on the testing issues were correct and the clear weight of the evidence supported the study as being done in accordance with professionally acceptable methods. It is significant that the petitioners are not claiming that the lower courts' consideration and weighing of the validation evidence was clearly erroneous. Their arguments pertain solely to alleged legal requirements for a validation study and fly clearly in the face of this Court's consistent admonition that there is no single method of appropriately validating employment tests.

Conclusion.

For the reasons stated above, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

DATED: January 20, 1981.

Respectfully submitted,

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